WRIT OF CERTIORARI AND RETURN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 194.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

FILED DECEMBER 10, 1906.

(16,806.)

(16,666.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 164.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 4, 1899.

1 To the Supreme Court of the United States:

In obedience to the annexed writ of certiorari, I hereby make return as in said writ commanded.

I.

In relation to specification No. 1, contained in said writ, I find, after examination, that the record as certified to your honorable court, pursuant to the writ of error issued in the action of Joe Kirby, plaintiff in error, *vs.* The United States, defendant in error, is in all respects the same as now appears upon the original records of the district court of the United States for the district of South Dakota in the suit of The United States, plaintiff, and Joe Kirby, defendant.

II.

In relation to specification No. 2, contained in said writ, I hereby return Exhibit "A," consisting of affidavits of jurors, pages "1" to "21," inclusive, the same being the affidavits referred to in paragraph "VII" of defendant's motion in arrest of judgment. I further certify and return that these same affidavits were used and by the court considered in support of a motion for a new trial, as will fully appear by assignment of error No. "XX," subdivisions "D"
2 and "E," page 106 of the printed record; and that said affidavits were not considered on the motion in arrest of judgment for the reason that in the opinion of the trial judge said affidavits did not contain matters proper to be urged on a motion to arrest the judgment which attacks the record only.

III.

In relation to specification No. 3, I hereby return Exhibit "B," consisting of journal entries, pages "1" to "10," inclusive, which I certify are true copies of the original record in the first trial of the suit of The United States, plaintiff, *vs.* Joe Kirby, defendant, in the district court of the United States for the district of South Dakota, upon the same indictment on which said Kirby was convicted, as the same now appears upon the records of said court.

Respectfully submitted.

JOHN E. CARLAND,
United States District Judge, District of South Dakota.

Dated Dec. 7th, 1898.

3 THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the judge of the district court of the United States for the district of South Dakota, Greeting:

Whereas in a certain suit in said district court between The United States, plaintiff, and Joe Kirby, defendant, which suit was removed to the Supreme Court of the United States by virtue of a

writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"And now comes the plaintiff in error and suggests to the court here that the record as certified to this court does not correctly state all the matters and things purported to be certified, and omits to state certain material matters which are essential to the proper consideration of the questions presented by the writ of error to this court for review upon the exceptions taken by the plaintiff in error at the time of his trial in the district court for the district of South Dakota. And thereupon the plaintiff in error shows:

I. That the statement upon the 9th page of the printed record that 'the jury being sworn in said cause, counsel for the defendant files a motion to discharge the defendant for the reason that the defendant has already been placed in jeopardy for the offence for which he is now to be tried,' is not a correct statement in this, that the said motion to discharge the plaintiff in error, to be found on pages sixteen and seventeen of the record, was in fact filed, heard and overruled by the court before the jury was sworn, as appears from the annexed affidavits.

II. Also in that it appears upon page eighteen of the record that the plaintiff in error filed a motion in arrest of judgment, and in support of the 7th clause thereof, and submitted certain affidavits of the jurors who rendered the verdict. That upon presenting said motion in arrest of judgment, the court, upon motion of the
4 United States district attorney, struck out said 7th clause and refused to consider the same, to which ruling the plaintiff in error duly excepted, as appears by page twelve of the record, and that this court cannot pass upon the matter of said exception as presented by assignment of errors XXI and XXII, page 107 of the printed —, without said affidavits being certified in the record. The said record does not certify said affidavits to this court, although they are still existing among the files of the case in said district court and in the custody and control of the clerk thereof, copies of which affidavits are hereunto attached as a part of this motion.

III. In that it appears all the matters and things mentioned in the said plea of former jeopardy, as set forth on pages sixteen and seventeen of the printed record, appear of record in this case in the trial court, and that the record of the trial court in this action shows that on the twenty-third of April, 1897, upon the former trial of this action, upon the plea of not guilty to the same indictment as is and was used upon the trial of the present action, which former trial resulted in a disagreement of the jury charged with said trial, said jury were brought into court, discharged from the further consideration of said case, which said discharge of the jury at that time plaintiff in error claims was ordered by the court during his absence and the absence of his counsel, and without his consent and against his wish and desire, and that the discharge of the jury the plaintiff in error insists was improper for that reason and otherwise, and hath ever claimed that he was thereby placed in jeopardy by the fact of that trial and was entitled to a discharge from further liability

on account of said indictment, and said discharge of the jury being without his knowledge of consent and without good or sufficient cause therefor, all of which at large and more fully appears from the records of said court s ill existing, and the plaintiff in error is advised that the case cannot properly be considered in this court unless this court shall have before it the record of said former trial, none of which has been certified in the record to this court."

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of November, A. D. 1898.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

5 EXHIBIT "A."

Affidavits of Jurors, Pages "1" *to* "21," *Inclusive.*

UNITED STATES OF AMERICA, }
District of South Dakota. }

District Court Thereof, Southern Division.

UNITED STATES, Plaintiff, }
vs. }
JOE KIRBY, Defendant. }

STATE OF SOUTH DAKOTA, }
County of ——, } *ss:*

I, the undersigned, being first duly sworn, do on oath depose and say that I am one of the jurors duly empaneled and sworn and charged in the above-entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the jurors by which to determine what was charged in the respective counts thereof; that I heard the word count used by the defendant in his objection to the evidence, and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there *was* four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had
6 been read to us; that each of said counts, as I understood the court to charge us, was as follows:

First. Were the stamps mentioned in the indictment stolen from the post-office at Highmore?

Second. Were the parties who stole the stamps from the post-office at Highmore convicted at Deadwood?

Third. Did the defendant receive those stamps knowing them to have been stolen?

Fourth. Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above-named constituted a count in said indictment; that, upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment was a major portion of the time six each way, and that part of the time seven of said jury voted "not guilty;" that said jury and the different members thereof in said voting, as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain; that finally, about five o'clock on June 12th, 1897, the jury, being unable to agree upon a general verdict, prepared a special verdict, to which, in the jury-room, they all agreed, which special verdict was reported into court and entered on the minutes of the court under direction of
7 the jury, but thereafter, and before the jury were discharged from the case, one of the jurors, Mr. Glass, dissented; that at the time said special verdict was reported, as aforesaid, the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that, as said special finding did not in any manner find the defendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning that we could arrive at the same result as our special finding indicated by finding the defendant guilty as charged in the first count; that on returning to the jury-room your affiant believed and has reason to believe, from the remarks and conversations had with his fellow-jurors, that several, if not all, of his fellow-jurors believed that the charge against the defendant of intending to convert said alleged stolen property or any part thereof to his own use or gain was not included in the first count of said indictment, and that it was the intent of this affiant and, as he believes, of all his fellow-jurors that by returning a verdict of guilty as charged in the first count they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen, or any part thereof, to his own use
8 or gain; that upon returning to the jury-room the last time after having rendered such special verdict, as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted or, as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict, and no more, and thereupon, upon coming into court the last time, when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said ver-

dict did not and should not exceed in its findings that found in the special verdict, and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain; that if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury-room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own
9 use or gain. Your affiant says that in his opinion there was no evidence whatever that would justify him, under his oath as a juror, either directly or indirectly, of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

E. FERGUSON.

Subscribed in my presence and sworn to before me by E. Ferguson this 18th day of June, A. D. 1897.

S. D. BROWN, [SEAL.]
Notary Public, South Dakota.

(Endorsements:) Filed June 22nd, 1897. O. S. Pendar, clerk.

10 UNITED STATES OF AMERICA, }
District of South Dakota. }

District Court Thereof, Southern Division.

UNITED STATES, Plaintiff, }
vs.
JOE KIRBY, Defendant. }

STATE OF SOUTH DAKOTA, }
County of Clay, } *ss:*

I, the undersigned, being first duly sworn, do on oath depose and say that I am one of the jurors duly empaneled and sworn and charged in the above-entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence, and also heard the word count used by the court, and that the court instructed us, as I understood it, that there *was* four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts, as I understood the
11 court to charge us, was as follows:

First. Were the stamps mentioned in the indictment stolen from the post-office at Highmore?

Second. Were the parties who stole the stamps from the post-office at Highmore convicted at Deadwood?

Third. Did the defendant receive those stamps knowing them to have been stolen?

Fourth. Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that, upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment was a major portion of the time six each way, and that part of the time seven of said jury voted "not guilty;" that said jury and the different members thereof in said voting, as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain; that finally, about five o'clock on June 12th, 1897, the jury, being unable to agree upon a general verdict, prepared a special verdict, to which in the jury-room they all agreed, which special verdict was reported into court and entered on the minutes of the court under direction of the jury, but there-
12 after, and before the jury were discharged from the case, one of the jurors, Mr. Glass, dissented; that at the time said special verdict was reported, as aforesaid, the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that, as said special finding did not in any manner find the defendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning that we could arrive at the same result as our special finding indicated by finding the defendant guilty as charged in the first count; that on returning to the jury-room your affiant believed, and has reason to believe, from the remarks and conversations had with his fellow-jurors, that several, if not all, of his fellow-jurors believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use or gain was not included in the first count of said indictment, and that it was the intent of this affiant and, as he believes, of all his fellow-jurors that by returning a verdict of guilty as charged in the first count they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen, or any part thereof, to his own use or gain; that upon returning to the jury-room the last time after having rendered such special verdict, as aforesaid, Mr. Glass insisted
13 that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted or, as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict, and no more, and thereupon, upon coming into court the last time, when the verdict of guilty was announced, the

foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings as found in the special verdict, and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty we in effect found that defendant intended to convert said property to his own use or gain; that if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury-room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own use or gain. Your affiant says that in his opinion there was no evi-
14 dence whatever that would justify him, under his oath as a juror, either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

J. H. DWYER.

Subscribed in my presence and sworn to before me by J. H. Dwyer this 18th day of June, A. D. 1897.

C. A. CHRISTOPHERSON,
[SEAL.] *Notary Public, South Dakota.*

(Endorsements:) Filed June 22nd, 1897. O. S. Pendar, clerk.

15 UNITED STATES OF AMERICA, }
District of South Dakota. }

District Court Thereof, Southern Division.

UNITED STATES, Plaintiff, }
vs.
JOE KIRBY, Defendant. }

STATE OF SOUTH DAKOTA, }
County of Moody, } *ss:*

I, the undersigned, being first duly sworn, do on oath depose and say that I am one of the jurors duly empaneled and sworn and charged in the above-entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence, and also heard the word count used by the court, and that the court instructed us, as I understood it, that there *was* four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that
16 had been read to us; that each of said counts, as I understood the court to charge us, was as follows:

First. Were the stamps mentioned in the indictment stolen from the post-office at Highmore?

Second. Were the parties who stole the stamps from the post-office at Highmore convicted at Deadwood?

Third. Did the defendant receive those stamps knowing them to have been stolen?

Fourth. Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that, upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment was a major portion of the time six each way, and that part of the time seven of said jury voted "not guilty;" that said jury and the different members thereof in said voting, as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain; that finally, about five o'clock on June 12th, 1897, the jury, being unable to agree upon a general verdict, prepared a special verdict, to which in the jury-room they all agreed, which special verdict was reported into court and entered on the minutes of the court under
17 direction of the jury, but thereafter, and before the jury were discharged from the case, one of the jurors, Mr. Glass, dissented; that at the time said special verdict was reported, as aforesaid, the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that, as said special finding did not in any manner find the defendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning that we could arrive at the same result as our special finding indicated by finding the defendant guilty as charged in the first count; that on returning to the jury-room your affiant believed, and has reason to believe from the remarks and conversations had with his fellow-jurors, that several, if not all, of his fellow-jurors believed that the charge against the defendant of intending to convert said alleged stolen property or any part thereof to his own use or gain was not included in the first count of said indictment, and that it was the intent of this affiant and, as he believes, of all his fellow-jurors, that by returning a verdict of guilty as charged in the first count they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen, or any part thereof, to his own use or gain; that upon returning to the jury-room the last time
18 after having rendered such special verdict, as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted or, as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict, and no more, and thereupon,

upon coming into court the last time, when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings that found in the special verdict, and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain; that if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury-room; that said jury never agreed that the said defendant intended to convert said stamps or any
19 part thereof to his own use or gain. Your affiant says that in his opinion there was no evidence whatever that would justify him, under his oath as a juror, either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

JOHN RICE.

Subscribed in my presence and sworn to before me by *18th* this 18th day of June, A. D. 1897.

F. L. ROWLAND,
[SEAL.] *Notary Public, South Dakota.*

(Endorsements:) Filed June 22nd, 1897. O. S. Pendar, clerk.

20 UNITED STATES OF AMERICA,
District of South Dakota, Southern Division.

UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant.

G. S. Hinds, being duly sworn, on oath deposes and says that he was one of the jurors duly empanelled, sworn, and charged in the above-entitled action on the 8th day of June, 1897.

That on the 12th day of June, 1897, said jury, after deliberation, appeared in court, and being interrogated by the court or by the clerk thereof as to whether they had agreed upon a verdict, and being answered in the affirmative by the foreman thereof, the jury, then being required to do so through their foreman, declared the verdict.

That the verdict, as affiant now remembers, was and is in the following form:

"We, the jury, find the defendant guilty as charged in the first count of the indictment."

That said verdict, upon being declared, was received by the court and entered upon the minutes thereof.

21 That, as this affiant is now advised, said verdict contains and embraces, among other things, the following finding of fact, to wit:

"That the defendant received the alleged stolen property in said indictment with the intent to convert the same to his own use," or that in substance.

That if such be the fact, that said verdict does embrace and make the foregoing finding of fact, the same is not and was not the verdict which this affiant agreed upon in the jury-room, and was not and is not the verdict of the jury.

That the verdict which the jury agreed to and which they sought to return to the court was and is in substance that the defendant had in his possession the alleged stolen property knowing the same to be stolen, and that the jury, through their foreman, sought to express in the foregoing form of the verdict given on the first page of this affidavit the verdict as just above stated, and it was sought by the jury to express in the verdict as finally declared and received by the court their agreement and verdict in substance that the defendant was guilty of having in his possession the alleged stolen property with the knowledge that the same was stolen.

Affiant further states that the jury had no means of knowing what the first count of the indictment charged, except the knowl-
22 edge they derived from hearing the indictment read at the commencement of the trial and from instructions of the court subsequently delivered; that no copy of said indictment was furnished to the jury nor used in the jury-room during their deliberations.

That if the verdict as declared and received is construed to contain the finding of the intent to appropriate such stolen property to his own use by the defendant, the same is a misunderstanding by the court as to the meaning the jury sought to convey by the verdict as declared, and that if such verdict as declared and received bears such construction, the same was and is an erroneous declaration of the actual verdict rendered, and that the entry is not and was not the verdict of the jury.

That the verdict of the jury is and was that the defendant had in his possession the alleged stolen property with knowledge that the same was stolen, or that in substance, and not that the defendant received said stolen property with intent to convert the same to his own use.

Affiant further states that this affidavit is made in absolute and perfect good faith, and to the sole and single purpose that justice may be done.

G. L. HINDS.

Signed and sworn to before me this 19th day of June, 1897.

JOHN C. KLEMME,
[SEAL.] *Notary Public, S. D.*

(Endorsement:) Filed June 22nd, 1897. O. S. Pendar, clerk.

23 UNITED STATES OF AMERICA,
District of South Dakota, Southern Division.

UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant.

Joseph A. Colcord, being duly sworn, on oath deposes and says that he was one of the jurors duly empanelled, sworn, and charged in the above-entitled action on the 8th day of June, 1897.

That on the 12th day of June, 1897, said jury, after deliberation, appeared in court, and being interrogated by the court or by the clerk thereof as to whether they had agreed upon a verdict, and being answered in the affirmative by the foreman thereof, the jury, then being required to do so through their foreman, declared the verdict.

That the verdict, as affiant now remembers, was and is in the following form:

"We, the jury, find the defendant guilty as charged in the first count of the indictment."

That said verdict, upon being declared, was received by the court and entered upon the minutes thereof.

That, as this affiant is now advised, said verdict contains
24 and embraces, among other things, the following finding of fact, to wit:

"That the defendant received the alleged stolen property in said indictment with the intent to convert the same to his own use," or that in substance.

That if such be the fact, that said verdict does embrace and make the foregoing finding of fact, the same is not and was not the verdict which this affiant agreed upon in the jury-room, and was not and is not the verdict of the jury.

That the verdict which the jury agreed to and which they sought to return to the court was and is in substance that the defendant received the alleged stolen property knowing the same to be stolen, and that the jury, through this affiant as its foreman, sought to express in the foregoing form of the verdict given on the first page of this affidavit the verdict as just above stated, and it was sought by the jury to express in the verdict as finally declared and received by the court their agreement and verdict in substance that the defendant was guilty of having received stolen property with the knowledge that the same was stolen.

Affiant further states that the jury had no means of knowing what the first count of the indictment charged except the knowledge they derived from hearing the indictment read at the commencement of the trial and from instructions of the court subsequently de-
25 livered; that no copy of said indictment was furnished to the jury nor used in the jury-room during their deliberations.

That if the verdict as declared and received is construed to contain the finding of the intent to appropriate such stolen property to his own use by the defendant, the same is a misunderstanding by

the court as to the meaning the jury sought to convey by the verdict as declared, and that if such verdict as declared and received bears such construction, the same was and is an erroneous declaration of the actual verdict rendered, and that the entry is not and was not the verdict of the jury.

That the verdict of the jury is and was that the defendant received the alleged stolen property with knowledge that the same was stolen, or that in substance, and not that the defendant received said stolen property with intent to convert the same to his own use.

Affiant further states that this affidavit is made in absolute and perfect good faith, and to the sole and single purpose that justice may be done.

JOSEPH A. COLCORD.

Signed and sworn to before me this 18th day of June, 1897.
[SEAL.] FRED E. GRANT,
Notary Public, S. D.

(Endorsements:) Filed June 22nd, 1897. O. S. Pendar, clerk.

26 EXHIBIT "B."

Journal Entries, Pages "1" to "10," Inclusive.

(Journal, p. 275.)

United States District Court for the District of South Dakota, October Term, A. D. 1896.

SIOUX FALLS, SATURDAY, *October* 31*st*, 1896.

THE UNITED STATES *vs.* JOE KIRBY. } No. 557. Arraignment.

Now comes the defendant, with his attorney, F. R. Aikens, and the assistant U. S. attorney moves his arraignment. Thereupon said defendant, by his attorney, waives the reading of the indictment in open court, and to such arraignment asks time until 2 p. m., Nov. 2, to enter his plea, which is granted by the court.

27 (Journal, p. 276.)

United States District Court for the District of South Dakota, October Term, A. D. 1896.

SIOUX FALLS, MONDAY, *November* 2*d*, 1896.

THE UNITED STATES *vs.* JOE KIRBY. } No. 557. Plea.

Now comes said defendant, with his attorney, F. R. Aikens, and files a demurrer to said indictment. This is taken up and argued by F. R. Aikens, for the defendant, and S. B. Van Buskirk, for the

Government, and is overruled by the court; which ruling is excepted to by defendant's attorney.

Thereupon defendant enters his plea of not guilty to said indictment.

28 (Journal, p. 384.)

United States District Court for the District of South Dakota, April Term, A. D. 1897.

SIOUX FALLS, MONDAY, *April* 19*th*, 1897.

THE UNITED STATES, Plaintiff,
vs
JOE KIRBY, Defendant. } No. 557.

On this day come the United States of America, by James D. Elliott, Esq., attorney for the district of South Dakota, and Stephen B. Van Buskirk, Esq., his assistant, and come- the said defendant in his own proper person and by his attorneys, F. R. Aiken, Esq., and D. R. Bailey, Esq., and, on motion of plaintiff, by its attorney, it is ordered by the court that a jury come to try the issue joined; whereupon the following were selected for the trial of this cause, to wit, Peter Wingen, Peter Becker, Peter Thompson, William Weldele, A. B. Green, John Vosberg, Henry Hartert, Harry Pike, Stephen Kostlan, Frank Wynn, J. W. Hobson, Wendell Obert, twelve good and lawful men of the southern division of the district aforesaid, duly selected, empanelled, and sworn to try the issue joined and a true verdict render according to the law and the evidence.

John Pusey, B. F. Torrey, William Sunderland, Richard S. Willett, and John Fletcher are sworn and duly examined on be-
29 half of the plaintiff.

Time for adjournment having arrived, on motion of the U. S. district attorney, it is ordered that the jury herein be placed in custody of two sworn officers of this court during the trial of this cause, which is done accordingly, and further proceedings in this cause *is* continued until opening of court tomorrow morning.

30 (Journal, p. 387.)

United States District Court for the District of South Dakota, April Term, A. D. 189–.

SIOUX FALLS, TUESDAY, *April* 20*th*, 1897.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

This day comes the parties to this cause, by their respective attorneys, and the jury heretofore sworn and empanelled, in the custody of the bailiffs; the defendant is present in his own proper person, and the trial proceeds as follows:

Orville Bennett, George H. Jenkins, Delos Lomison, J. J. Ryan,

Elmer G. Leech, J. M. O'Neill, Phil. F. Campbell, H. A. Pratt, A. S. Ellis, B. F. Herington, E. G. Landon, M. Richards, W. E. Smith, W. J. Fenelon, Emmet Burke, James Garrington, and Samuel Saul are duly sworn and examined on behalf of the plaintiff.

Time for adjournment having arrived and the trial of this cause not being completed, further proceedings are continued until tomorrow morning at the opening of court.

31 (Journal, p. 390.)

United States District Court for the District of South Dakota, April Term, A. D. 1897.

SIOUX FALLS, WEDNESDAY, *April 21st*, 1897.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

This day again come the parties to this cause, by their respective attorneys, and the jury heretofore sworn and empanelled, in the custody of the bailiffs; the defendant is present in his own proper person, and the trial proceeds as follows:

Oliver S. Pendar, Fred. Stone, B. N. Lister, Madison Haverly, William Toomey, W. C. French, Otto Scherzer, Melville English, J. H. Howe, L. S. Tyler, Wm. Nicoli, M. C. Fosnes, W. E. Reeve, and S. B. Van Buskirk are duly sworn and examined on behalf of the plaintiff.

Here plaintiff rests.

Time for usual adjournment having nearly arrived and this trial not being completed, further proceedings are continued until opening of court tomorrow morning.

32 (Journal, p. 394.)

United States District Court for the District of South Dakota, April Term, A. D. 1897.

SIOUX FALLS, THURSDAY, *April 22nd*, 1897.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

This day again come the parties to this cause, by their respective attorneys, and the jury heretofore sworn and empanelled, in the custody of the bailiffs; the defendant is present in his own proper person, and the trial proceeds as follows:

Now, at this time, the plaintiff having rested its case, just previous to adjournment of court on yesterday, on motion of defendant, the court makes the following order, to wit:

UNITED STATES
vs.
JOE KIRBY.

This action having come on duly for trial before the court and a jury, at Sioux Falls, South Dakota, on the 19th day of April, 1897, upon the plea of not guilty entered by the defendant, and a jury having been thereupon duly and legally empanelled, sworn, and charged according to law to try such issues and true deliverance make, and after the prosecution had introduced evidence be-
33 fore said jury for the purpose of establishing each of the counts contained in said indictment, and the prosecution having thereupon rested, the defendant, Joe Kirby, moved the court to rule as a matter of law that sufficient evidence had not been introduced to justify the verdict other than that of not guilty as to the charge contained in that part of said indictment referred to by the defendant as the fifth and sixth counts therein and designated by the prosecution as the third count thereof in said indictment, being that part of said indictment relating to the alleged larceny from Waubay post-office and the receiving and possession of the same by the defendant with the intent to convert the same to his own use, he knowing the same to have been stolen therefrom, and the court having sustained said motion:

Now, therefore, the said defendant, Joe Kirby, is adjudged not guilty of the charge mentioned as aforesaid, and that he be discharged therefrom and go hence without day.

And thereupon the said defendant, Joe Kirby, did further move the court that the court rule and hold as a matter of law that the prosecution had not introduced evidence sufficient to justify the verdict other than that of not guilty as to the matters and things set forth in that part of said indictment designated by the defendant as the third and fourth counts, and which has been designated by the prosecution as the second count, being that part of said
34 indictment which relates to the post-office of Miller and the alleged larceny therefrom and the alleged receipt of postage stamps stolen from the said post-office by the said defendant with the intent to convert the same to his own use, he knowing the same to have been stolen, and said motion having been sustained by the court:

Now, therefore, it is adjudged that as to said count in said indictment last aforesaid the said defendant is adjudged not guilty, and that he be discharged therefrom and go hence without day.

By the court:

JOHN E. CARLAND, *Judge.*

Now S. B. Van Buskirk is recalled and examined on behalf of the defendant.

Here defendant rests.

And the said jury, after hearing the evidence and argument of counsel and receiving the charge of the court, retire at 3.30 o'clock

in the afternoon to consider of their verdict, in custody of two bailiffs especially sworn for the purpose.

35 (Journal, p. 399.)

United States District Court for the District of South Dakota, April Term, A. D. 1897.

SIOUX FALLS, FRIDAY, *April 23rd*, 1897.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

Comes the jury into court this day, at about four o'clock in the afternoon, and state to the court that they are unable to agree upon a verdict.

Whereupon the court, being of the opinion that said jury could not agree, discharged them from further consideration of this case.

Endorsed on cover: File No. 16,666. Supreme Court of the U.S., October term, 1898. Term No., 164. Joe Kirby, plaintiff in error, *vs.* The United States. Writ of certiorari & return. Filed December 10, 1898.